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In the Supreme Court of the United States

OCTOBER TERM, 1991

MARY GADE, DIRECTOR, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Section 18(b) of the Occupational Safety and Health Act of 1970 provides that any State that desires to assume responsibility for development and enforcement of "occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated" shall submit a state plan to the Secretary of Labor for approval. 29 U.S.C. 667(b). The question presented is whether this provision precludes a State from developing or enforcing "dual purpose" safety and health standards, which protect both workers and the general public, without submitting a state plan.

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INTEREST OF THE UNITED STATES

This action challenges the validity of two statutes enacted by the State of Illinois and enforced by petitioner. The action claims, among other things, that the statutes are preempted under the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, by operation of Section 18 of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 667. The court of appeals held part of the statutes to be preempted, and remanded to the district court to determine whether the other statutory provisions are also preempted in light of the test for OSH Act preemption set forth in its decision.

The question presented is whether the OSH Act requires a State to obtain federal approval before supplementing federal occupational safety and health standards

with additional requirements that serve a "dual purpose" of protecting both workers and the general public. Under the OSH Act, the Secretary of Labor is charged with promulgating and enforcing occupational safety and health standards of national scope, and with administering the program for approving state occupational safety and health plans. The Secretary therefore has a keen interest in the proper interpretation of Section 18.

STATEMENT

1. Congress enacted the OSH Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." § 2(b), 29 U.S.C. 651(b). To achieve that objective, Section 6(a) authorizes the Secretary of Labor to establish "occupational safety [and] health standard[s]." 29 U.S.C. 655(a). The OSH Act defines an "occupational safety and health standard" as

> a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

§ 3(8), 29 U.S.C. 652(8). The standards promulgated by the Secretary pursuant to the statute's mandate comprise a body of national regulations respecting specific occupational safety and health issues. See 29 C.F.R. Pt. 1910. The Secretary has delegated her authority under the Act to the Occupational Safety and Health Administration (OSHA). See *Martin* v. *OSHRC*, 111 S. Ct. 1171, 1174 n.1 (1991).

The role of the States in regulating occupational safety and health issues is addressed in Section 18. 29 U.S.C. 667. Section 18(a) provides that a State may continue to assert "jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect." 29 U.S.C. 667(a). Section 18(b) further provides that if a State "desires to assume responsibility for development and enforcement" of "occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under [Section 6 of the OSH Act, 29 U.S.C. 655]" the State "shall submit" a state plan concerning such standards. 29 U.S.C. 667(b).

The remaining subsections of Section 18 prescribe the requirements for, and federal supervision of, state plans. Section 18(c) states that the Secretary shall approve a state plan if it meets certain prescribed conditions. 29 U.S.C. 667(c); see 29 C.F.R. Pt. 1902 (state plan approval criteria). For instance, a state plan must provide for the development and enforcement of safety and health standards that are "at least as effective" as the corresponding federal standards, and must provide for enforcement authority comparable to that of federal OSHA. 29 C.F.R. 1902.1(b). Section 18(d) gives the Secretary authority to reject a state plan that does not meet the prescribed criteria. 29 U.S.C. 667(d). Section 18(e) permits the Secretary, upon approving a state plan, to exercise concurrent jurisdiction to enforce federal standards for at least three years. 29 U.S.C. 667(e). Section 18(f) requires continual evaluation of state plans and the withdrawal of state plan approval if the Secretary determines, based upon state reports and her own investigations (after the opportunity for a hearing) that the State has failed to comply substantially with its plan. 29 U.S.C. 667(f).[1]

In addition to authorizing "the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce"

[1] Section 18(g) provides for judicial review of a withdrawal decision. 29 U.S.C. 667(g). Section 18(h) was a transitional provision (which expired on December 29, 1972) that permitted the Secretary to enter into an agreement with a State to permit the State to enforce its standards pending final action by the Secretary with respect to a submitted state plan.

(§ 2(b)(3), 29 U.S.C. 651(b)(3)), the Act thus "encourag[es] the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws" through the adoption of federally approved state plans (§ 2(b)(11), 29 U.S.C. 651(b)(11)). The Act established a program of "cooperative federalism" in which, within the framework of federal preemption, enforcement responsibilities are delegated back to those States willing to assume those responsibilities in accordance with the Act's state plan requirements. *American Federation of Labor (AFL-CIO)* v. *Marshall*, 570 F.2d 1030, 1037-1038 n.22 (D.C. Cir. 1978).

2. In 1986, Congress directed the Secretary of Labor to promulgate interim and final standards, pursuant to Section 6 of the OSH Act, to protect the safety and health of employees engaged in hazardous waste operations. See Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, Tit. I, § 126, 100 Stat. 1690-1692, reprinted in relevant part at 29 U.S.C. 655 note; see generally 54 Fed. Reg. 9294-9295 (1989) (legislative background to OSHA hazardous waste standard). Section 126(b) of SARA lists eleven subjects, ranging from site analysis to emergency response, to be included (if supported by the rulemaking record) in the final hazardous waste worker protection standard. Section 126(b)(2) specifically requires the standard to include "[r]equirements for contractors to provide initial and routine training of workers." Section 126(d) contains additional direction on specific training and certification requirements. 29 U.S.C. 655 note.

The Secretary issued an interim final standard, effective December 19, 1986, to protect workers engaged in hazardous waste operations and emergency response. 51 Fed. Reg. 45,654-45,675 (1986). Thereafter, the Secretary issued a final standard, effective March 6, 1990, establishing a comprehensive program for workers at a wide range of hazardous waste sites, including sites identified for clean-up by governmental agencies, sites used for routine hazardous waste treatment, storage and disposal, and sites that are the subject of emergency clean-up operations. 54 Fed. Reg. 9294-9336 (1989); 29 C.F.R. 1910.120. The final standard imposes substantive requirements with respect to each of the eleven subjects identified in Section 126(b) of SARA, and also imposes requirements concerning other topics such as safety and health programs, site control, and sanitation. See 29 C.F.R. 1910.120(b)-(o).

The standard thus contains detailed provisions concerning worker training and certification at hazardous waste sites. 29 C.F.R. 1910.120(e). Its training provision requires, among other things, that "[g]eneral site workers (such as equipment operators, general laborers and supervisory personnel) * * * shall receive a minimum of 40 hours of instruction off the site, and a minimum of three days actual field experience." 29 C.F.R. 1910.120(e)(3)(i). On-site management and supervisors directly responsible for hazardous waste operations must receive the same initial training, plus at least eight additional hours of specialized training and three days of supervised field experience. 29 C.F.R. 1910.120(e)(4). Documented or certified work experience or training equivalent to the mandated initial training may substitute for the 40 hour requirement, although site-specific training and supervised field experience is also required. 29 C.F.R. 1910.120(e)(9). "The intent of the final training provisions is to provide employees with the knowledge and skills necessary to perform hazardous waste clean-up operations with minimal risk to their safety and health." 54 Fed. Reg. at 9304 (1989).

The Federal Register notice discussed the effect of the federal standard on state regulation of worker safety at hazardous waste sites. 54 Fed. Reg. 9315-9316 (1989). The notice explained that the federal standard responds to Congress' conclusion in SARA that "protection of employees engaged in hazardous waste operations and emergency response" is "a problem of national scope." *Id.* at

9315. It added that Section 18 of the OSH Act allows a State to participate in the protection of those employees, and avoid the preemption of state laws, through the submission of a state plan. *Ibid.*[2]

3. On August 23, 1988, while the Secretary's interim final standard was in effect, the State of Illinois enacted the Hazardous Waste Equipment Operators and Laborers Act, Ill. Ann. Stat. ch. 111, paras. 7701-7717 (Smith-Hurd 1991), and the Hazardous Waste Laborers Licensing Act, Ill. Ann. Stat. ch. 111, paras. 7801-7815 (Smith-Hurd 1991). These laws, which are designated as acts "in relation to environmental protection," have a stated legislative purpose "to promote job safety and to protect life, limb, and property." *Id.* at paras. 7701-7702, 7801-7802. They accomplish those purposes principally through the licensing of hazardous waste equipment operators and laborers working at covered facilities. *Id.* at paras. 7704-7707, 7804-7806.[3]

Both laws require a license applicant to provide a certified record of at least 40 hours of training conducted "within the State of Illinois," to pass a written examination, and to complete an annual refresher course of at least eight hours of instruction. Ill. Ann. Stat. ch. 111

[2] Stating that "OSHA has used its regulatory preemption of State law to the minimum level necessary to achieve the objectives of the OSH Act and Section 126 of SARA," 54 Fed. Reg. 9315 (1989), the Federal Register notes the Secretary's certification that the standard complies with Executive Order No. 12,612 (52 Fed. Reg. 41,685-41,688 (1987)), which directs agencies to avoid taking preemptive action without clear constitutional authority and the presence of a national problem. 54 Fed. Reg. 9316 (1989).

[3] The Illinois laws appear narrower in scope than the OSHA standard because their definition of "[f]acility" does not include any voluntary clean-up sites or emergency response sites. See Ill. Ann. Stat. ch. 111, paras. 7703(f), 7803(e) (Smith-Hurd 1991). In addition, the Illinois laws do not apply to certain classes of hazardous waste workers that are covered by the OSHA standard. See *id.* at paras. 7704(c)-(f), 7804(b)-(e). On the other hand, the Illinois laws do not appear to apply to any sites or employees that are not also covered by the OSHA standard.

paras. 7705(c) and (e), 7707(b), 7805(c) and (d), 7806(b) (Smith-Hurd 1991). In addition, equipment operators, but not laborers (or operator apprentices), are required to have a certified record showing 4000 hours of experience in the operation of equipment used in hazardous waste handling. *Id.* at para. 7705(d). The laws also include provisions for administration and enforcement. See *id.* at paras. 7708-7717, 7807-7815. The State of Illinois has not submitted the laws to the Secretary of Labor for approval as part of a state plan.[4]

4. Respondent, a trade association of employers in the hazardous waste remediation industry, brought suit in the United States District Court for the Northern District of Illinois challenging the Illinois laws under the Commerce Clause and the Supremacy Clause of the United States Constitution. See U.S. Const. Art. I, § 8, Cl. 3; Art. VI, Cl. 2. The district court determined that respondent's Commerce Clause challenge was not ripe, but reached and largely rejected respondent's Supremacy Clause claims. Pet. App. 47-62.

The district court observed that the Secretary had issued a federal standard regulating the "same matter" as the Illinois laws, but concluded that Section 18 of the OSH Act preempts only those provisions of the Illinois laws that lack a "legitimate and substantial purpose apart from promoting job safety." Pet. App. 49, 54. The district court held that the 4000-hour experience requirement substantially advances the State's public safety and environmental protection objective ("to protect life, limb, and property" (see Ill. Ann. Stat. ch. 111 paras. 7702, 7802)) and is therefore saved from preemption. Pet. App. 58-59, 62. It concluded that the training-within-Illinois provision, on the other hand, does not substantially ad-

[4] Shortly after enactment of the OSH Act, Illinois submitted and received initial approval for a state plan, but it withdrew its plan on June 30, 1975. 40 Fed. Reg. 24,523 (1975); see *AFL-CIO* v. *Marshall*, 570 F.2d at 308 n.23. Currently, 25 States or territorial jurisdictions have obtained state plan approval from OSHA, including two with plans applicable only to state and local public employees. See 29 C.F.R. Pts. 1952, 1956.

vance that objective and thus is preempted. *Id.* at 57-58, 62. The district court did not address the other provisions of the Illinois laws.

5. The court of appeals vacated the district court's judgment and remanded. Pet. App. 3-43. It first determined, in accord with longstanding precedent, that Section 18 "expressly prohibits states without federally approved state plans from exercising jurisdiction over an occupational health and safety matter as to which OSHA has already duly promulgated a federal standard." *Id.* at 17. The court of appeals concluded, however, that "[t]he language of section 18 of the OSH Act does not indicate whether a state law or regulation that purports to serve a dual purpose is preempted." *Id.* at 14.

The court recognized that "Section 18 is designed to avoid subjecting workers and employers to duplicative regulation, while allowing states the flexibility to tailor worker health and safety programs to their own needs." Pet. App. 19. It observed that Section 18's provisions for federal review of state plans would be thwarted if a State could immunize worker safety and health laws from the process "simply by asserting a non-occupational purpose for the legislation." *Id.* at 18. The court accordingly adopted the following approach:

> When an OSHA standard exists, and the state has not submitted a section 18 plan, we undertake a two-step inquiry. First, we determine whether the challenged state law or regulation constitutes, in a direct, clear and substantial way, regulation of worker health and safety. A key factor in resolving this question is whether the state law affects employer-employee obligations with respect to health and safety matters in the workplace. Second, we attempt to extricate from the state law or regulation and invalidate those provisions that relate to worker health and safety in a direct, clear and substantial way. In this connection, we must strike any provision with a dual purpose and effect from which the worker health and safety aspect cannot be removed.

Id. at 19.

Applying that test, the court held that Illinois' 4000-hour experience requirement is preempted because it

> directly, clearly and substantially implicates worker health and safety as well as public health and safety, and it is impossible to modify the provision so as to delete matter serving the impermissible worker health and safety goal without also eliminating matter serving the permissible public health and safety goal.

Pet. App. 29. The court remanded the case with directions that the district court determine whether other provisions in the Illinois statutes also are preempted, observing that the State had not yet given those provisions "concrete form" through implementing regulations. *Id.* at 32.

Writing separately, Judge Easterbrook expressed doubt that Section 18 of the OSH Act should be read as a pre-emption provision. He suggested that Section 18 could be construed to provide a State with two options: The State may either (1) "oust" the federal standard by submitting a state plan to the Secretary for approval; or (2) "add to" the federal standard without seeking the Secretary's approval. Pet. App. 35-36. He concluded, however, that if Section 18 does provide a basis for preemption of state law, then the court employed an appropriate test for pre-emption of "dual purpose" state laws. *Id.* at 34-35, 42.

SUMMARY OF ARGUMENT

In 1986, Congress directed the Secretary of Labor to adopt national standards for the protection of employees engaged in hazardous waste operations. Pursuant to that directive, the Secretary established a comprehensive health and safety standard that, *inter alia*, requires training and field experience certification of employees working at hazardous waste sites. 29 C.F.R. 1910.120(e). Thereafter, the State of Illinois adopted laws imposing additional work experience and licensing requirements on employees working at hazardous waste sites in Illinois. The State of Illinois did not seek the approval of the Secretary under Section 18 of the OSH Act prior to seeking

enforcement of these additional safety requirements. The express provisions of the OSH Act preclude enforcement of the work experience requirement at issue in this case, unless and until the State of Illinois submits a state plan to the Secretary, and obtains her approval.

A. Once the Secretary adopts a federal standard governing an "occupational safety or health issue," a State that "desires to assume responsibility for development and enforcement" of any occupational standards "relating" to the same issue "*shall* submit a State plan" for "approval" by the Secretary of Labor. 29 U.S.C. 667(b) and (c) (emphasis added). If a State fails to comply with the statute's mandatory directive to submit a plan before assuming regulatory responsibility over such issues, the literal language of Section 18 requires the common sense conclusion that a state law that has not been approved cannot be enforced. 29 U.S.C. 667(a) (saving from preemption any "State law over any occupational safety or health issue with respect to which no standard is in effect"); 29 U.S.C. 667(h) (providing that the Secretary could enter into an agreement to permit a State to enforce state safety standards prior to approval of a plan, but only for a two year transitional period following adoption of the Act).

The preemptive language of Section 18 is not limited to state laws that directly conflict with the federal standard. It encompasses any state "occupational safety and health standard" that "relate[s]" to a worker safety issue addressed by a federal standard. 29 U.S.C. 667(b). A state law that supplements the federal regulation of an issue "relates" to that issue, regardless of whether the substantive requirements of state and federal law actually conflict.

B. Since preemption extends to any unapproved state "occupational safety and health standard" that relates to a federally regulated worker safety issue, the dispositive issue in this case is whether the Illinois law should be

characterized as an "occupational safety [and] health standard," or a public health and safety standard. The language of the statutory definition, and the Secretary's longstanding interpretation of that section, support the conclusion that a state law that has the primary purpose or the primary effect of regulating worker health and safety practices is an "occupational safety and health standard," even if it also protects non-workers. 29 U.S.C. 652(8) (defining an "occupational safety [and] health standard" as one which "requires conditions [or] * * * practices * * * reasonably necessary or appropriate to provide safe and healthful employment and places of employment.").

Under the Secretary's interpretation, a law of general applicability that regulates the conduct of workers and non-workers alike would generally not be characterized as an "occupational" standard, because its primary purpose and effect would be the regulation of public safety and not that of workers. A law such as the Illinois statute at issue however, which imposes experience requirements on hazardous waste workers, would have the primary effect of regulating job-site safety practices—the very "issue" addressed by the Secretary's hazardous waste site standard. Since Illinois did not submit a plan providing for the adoption and enforcement of standards governing this issue, the court of appeals correctly concluded that the law is preempted by the OSH Act.

ARGUMENT

THE OSH ACT PREEMPTS STATE OCCUPATIONAL SAFETY AND HEALTH STANDARDS THAT RELATE TO ISSUES ADDRESSED BY A FEDERAL OSHA STANDARD AND FOR WHICH A STATE HAS NOT SUBMITTED A STATE PLAN, INCLUDING STATE STANDARDS WITH A DUAL PURPOSE OF REGULATING THE SAFETY AND HEALTH OF WORKERS AND THE GENERAL PUBLIC

A. Section 18 Of The OSH Act Expressly Preempts Enforcement Of Any State Occupational Safety and Health Standards Relating To Issues Governed By A Federal OSHA Standard Prior to Approval of a State Plan By The Secretary Of Labor

1. It is well established that "pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 738 (1985); accord *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 482 (1990). The OSH Act does not include statutory language that directly states that failure to submit a plan under Section 18 precludes enforcement of state laws regulating worker health and safety issues addressed by federal OSHA standards. There is, however, only one reasonable interpretation of the express language and structure of the OSH Act: All state laws that fall within the definition of "occupational safety and health standards" that "relat[e] to * * * any occupational safety and health issue with respect to which a Federal standard has been promulgated," 29 U.S.C. 667(b), are unenforceable until approved as part of a state plan by the Secretary of Labor under Section 18.

a. Section 18(a) of the OSH Act expresses a clear and unmistakable intent to prohibit enforcement of any state occupational safety law that unilaterally alters or supplements a federal OSHA standard. Section 18(a) achieves this result by identifying a class of state occupational

health and safety laws that are *not* preempted by the OSH Act, stating that "[n]othing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect." 29 U.S.C. 667(a).

The import of this language is clear. State occupational safety laws that relate to issues that have not been addressed by federal standards are not preempted. State occupational safety laws that relate to issues that have been addressed by federal standards are preempted, unless saved by the remaining provisions of Section 18, *i.e.*, the plan approval process.

Petitioner's argument that the OSH Act has no preemptive force whatsoever fails to address the clear negative implication of this language. Petitioner offers no explanation of what Section 18(a) means, if it does not mean that federal standards, once they are in place, are preemptive. In short, petitioner's argument would render Section 18(a) entirely superfluous.

b. The succeeding paragraphs of Section 18 confirm this interpretation of Section 18(a). Section 18(b) provides that once a federal standard is in effect, any State that "desires to assume responsibility for development and enforcement" of occupational standards pertaining to that safety issue "*shall* submit a State plan," 29 U.S.C. 667(b) (emphasis added), in order to obtain "approval" from the Secretary of Labor. 29 U.S.C. 667(c). The statute does *not* say that any State that wishes to assume "exclusive" responsibility for the safety issue shall submit a plan. *Any* assumption of responsibility for "development and enforcement" of standards pertaining to a federally-regulated occupational health and safety issue requires submission of a plan. If a state plan's terms meet the substantive requirements of Section 18, the Secretary of Labor must approve the plan. By this method, the States may regain a role in the regulation of the issues governed by otherwise applicable federal standards.

It is logical to infer that state regulations that "shall" be "approve[d]" by the Department of Labor cannot be enforced in the absence of such approval. Other provisions of Section 18 confirm this common-sense interpretation of the Act. Under Section 18(f), the Secretary may withdraw approval under certain circumstances. 29 U.S.C. 667(f). When this is done, the plan "shall cease to be in effect" and the State is permitted to assert jurisdiction under its occupational health and safety law only in a limited class of cases "commenced before the withdrawal of the plan." *Ibid.* Yet under petitioner's theory, the only consequence of the Secretary's withdrawal of plan approval should be that federal and state jurisdiction becomes concurrent, *not* that state jurisdiction is withdrawn or changed. Section 18(f) thus confirms that States are not permitted to assume an enforcement role without the Secretary's approval (if a federal standard relating to the same issue is in effect).

Similarly, Section 18(h) provides that States could "enforce * * * occupational health and safety standards in effect in such State" prior to approval of a state plan, but only during the two years following adoption of the Act, and only with the express agreement of the Secretary. 29 U.S.C. 667(h). This provision would also have been unnecessary if Section 18 was not intended to have preemptive effect. Petitioner offers no explanation for why any agreement was necessary to enforce a state law during Section 18(h)'s interim period, if, as she maintains, the plan requirements are optional and operate only if a State wishes to displace federal law entirely.

c. Petitioner's reliance on the presumption that federal regulation of health and safety issues does not ordinarily preempt state initiatives in the field is accordingly misplaced. Section 18 erects a clear scheme respecting the States' roles in protecting occupational safety and health: If there is no applicable federal standard, the

States may act as they traditionally have; if, on the other hand, there is an applicable federal standard, the States must submit to the plan requirements if they wish to continue to regulate. Thus, Section 18 does not give the States a completely free rein in regulating worker safety and health, but it also does not completely exclude the States from regulating those issues. See *Michigan Canners & Freezers Ass'n, Inc.* v. *Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 469 (1984) ("Congress may explicitly define the extent to which it intends to preempt state law.").

This careful structure therefore "overcome[s] the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation" of the same maters. *Hillsborough County* v. *Automated Medical Laboratories*, 471 U.S. 707, 716 (1985).[5] Given the clarity of the statutory structure, the

[5] The language of Section 18(a) and (b) distinguishes this case from *Wisconsin Public Intervenor* v. *Mortier*, 111 S. Ct. 2476 (1991). In these sections, Congress explicitly delineated when a State could assert jurisdiction over an occupational safety and health issue (*i.e.*, when no federal standard is in effect) and how it could assume responsibility for the development of occupational safety and health standards relating to promulgated federal standards (*i.e.*, through the submission of a state plan for OSHA approval). The "inescapable implication" is that the existence of OSHA standards preempts the States without state plans from asserting jurisdiction over federally regulated occupational safety and health issues. Cf. *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 10 (1957). By contrast, the Federal Insecticide, Fungicide, and Rodenticide Act, the statute at issue in *Mortier*, "specifies that States may regulate the sale or use of pesticides so long as the state regulation does not permit a sale or use prohibited by the Act." 111 S.Ct. at 2480, citing 7 U.S.C. 136v(a). This Court concluded that this grant of regulatory authority to the States cannot be read as an implicit preemption of local political subdivisions, particularly since the subdivisions are themselves "components of the very entity the statute empowers." 111 S. Ct. at 2483. Cf. *Ohio Mfrs. Ass'n* v. *City of Akron*, 801 F.2d 824 (6th Cir. 1986), cert. denied, 484 U.S. 801 (1987) (local law preempted by OSHA stand-

"clear and manifest," *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), consequences of a State's failure to participate in the state plan process are inescapable:

> Although written in the form of a savings clause rather than a direct statement of preemption, this section clearly provides that if a federal standard on an occupational safety and health issue is in effect, a state cannot promulgate an occupational safety or health standard relating to that issue, unless it first submits the state plan to OSHA for approval.

Associated Indus. v. *Snow*, 898 F.2d 274, 278 (1st Cir. 1990). Indeed, every court that has addressed the OSH Act's preemptive force has agreed with the court of appeals in this case that "section 18 unquestionably preempts any state law or regulation whose sole purpose and effect is to establish a standard pertaining to worker health and safety where OSHA has already promulgated such a standard and that state has not obtained the Secretary of Labor's approval for its own plan." Pet. App. 14.[6]

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ard, but not by OSH Act itself, which expressly preempts only state law). By contrast, Section 18(a) of the OSH Act, which permits States to continue to enforce state standards in the absence of federal standards, does not make sense unless States may not enforce their standards once federal standards are in place.

[6] See, *e.g.*, *Associated Indus.* v. *Snow*, 898 F.2d at 278; *Environmental Encapsulating Corp.* v. *City of New York*, 855 F.2d 48, 55 (2d Cir. 1988); *Farmworker Justice Fund, Inc.* v. *Brock*, 811 F.2d 613, 625-626, 640-641, vacated on other grounds, 817 F.2d 890 (D.C. Cir. 1987); *Manufacturers Ass'n of Tri-County* v. *Knepper*, 801 F.2d 130 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987); *Ohio Mfrs. Ass'n* v. *City of Akron*, 801 F.2d 824, 828 (6th Cir. 1986), appeal dismissed and cert. denied, 484 U.S. 801 (1987); *United Steelworkers* v. *Auchter*, 763 F.2d 728, 736 (3d Cir. 1985); *Five Migrant Farmworkers* v. *Hoffman*, 345 A.2d 378, 380 (N.J. Super. Ct. App. 1975); *Columbus Coated Fabrics* v. *Industrial Comm'n*, 1 O.S.H.C. (BNA) 1361 (S.D. Ohio 1973). See also Pet. App. 17 (collecting additional cases). In addition, several courts, while holding that the OSH Act does not preempt state criminal prose-

2. Petitioner nevertheless argues that Section 18 should not be read to preempt State laws that "supplement" or "add to" OSHA standards without conflicting directly with them. Pet. Br. 20-22. Petitioner contends that a State should be able to supplement federal law without having to submit a comprehensive state plan that would displace federal law under Section 18. That argument finds no case support because it is inconsistent with the language, purposes, and legislative history of the Act.

a. The Act plainly provides that a State "*shall* submit a State plan" if it desires to "assume responsibility for development and enforcement" of any state occupational standards "relating to" an OSHA-regulated safety or health issue. 29 U.S.C. 667(b) (emphasis added). Section 18(b)'s mandatory directive is not limited to state efforts that would "displace or conflict with" a federal standard. As this Court has recognized in analogous contexts, state standards that "supplement or add to" a federal standard also "relat[e] to" the federally regulated issue. See, *e.g.*, *Metropolitan Life Insurance Co.*, 471 U.S. at 739; *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). See also S. Bokat & H. Thompson, *Occupational Safety and Health Law* 683 (BNA 1988) ("Unlike many other federal laws, the OSH Act does not afford the state complete freedom to enact supplementary or complementary requirements in areas addressed by federal standards"); *id.* at 686 n.28 ("Section 18(b) of the Act permits states to adopt more effective standards only through the vehicle of an approved state plan"). Thus, state regulation of an issue addressed in a federal standard may

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cutions, have likewise recognized the supremacy of OSHA standards over state regulatory standards. *People* v. *Pymm*, 563 N.E. 2d 1, 5 (N.Y. 1990), cert. denied, 111 S. Ct. 958 (1991); *People* v. *Chicago Magnet Wire*, 534 N.E. 2d 962, 965 (Ill.), cert. denied *sub nom. Asta* v. *Illinois*, 493 U.S. 809 (1989); *People* v. *Hegedus*, 443 N.W. 2d 127, 132 (Mich. 1989); *State ex rel. Cornellier* v. *Black*, 425 N.W. 2d 21, 24 (Wis. Ct. App. 1988).

only be accomplished by submission and approval of a state plan.[7]

b. Contrary to petitioner's contention, Pet. Br. 18-22, this literal interpretation of the statutory language is fully consistent with the purposes of "cooperative federalism" reflected in the Act. Although Congress surely intended to "encourag[e] the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws," § 2(b)(11), 29 U.S.C. 651(b)(11); see *AFL-CIO* v. *Marshall*, 570 F.2d at 1037, Congress also emphasized the need for national standards and national control.[8] The OSH Act evolved out of Con-

[7] "Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 369 (1986). See also, *e.g.*, *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699 (1984); *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153-154 (1982); *United States* v. *Shimer*, 367 U.S. 374, 381-383 (1961). Under the OSH Act, there is no preemption without the issuance of a standard. However, when a standard issues, state preemption is automatic and flows directly from the statute. It is therefore unnecessary for the Secretary to incorporate an explicit preemption statement into each and every standard. In fact, that has been done only once. See 29 C.F.R. 1910.1200(a)(2) (hazard communication). In that instance, a statement was included because preemption was a significant issue in the rulemaking. See 48 Fed. Reg. 53,280, 53,283-53,284, 53,322-53,323, 53,334 (1983). Additionally, it removed any ambiguity concerning the preemption of local, in addition to state, standards. See *Ohio Mfrs. Ass'n*, 801 F.2d at 831-832. The hazardous waste workers standard, like all other OSHA standards with the exception of the hazard communication standard, does not include a preemption statement, although its preamble described the state plan process, and specified that "states with occupational safety and health plans approved by OSHA under Section 18 of the OSH Act would be able to develop their own state standards to address any special problems." 54 Fed. Reg. 9315 (1989). Cf. *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 158 & n.13 (deference owed regulatory preamble).

[8] Section 2(b)(11) cannot bear the weight that petitioner places on it. While it is true that Section 2(b)(11) encourages the States

gressional recognition that "[t]he inadequacy of anything less than a comprehensive, nationwide approach has been exemplified by [state] experience" with disparate regulation of particular issues. S. Rep. No. 1282, 91st Cong., 2d Sess. 4 (1970), *reprinted in* Staff on the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 144 (Comm. Print 1971) [*Leg. Hist.*]. Congress carefully preserved federal oversight and control of state standards through the plan submission and approval process. Yet petitioner's interpretation would emphasize the Act's preservation of state jurisdiction to the exclusion of the Act's additional purpose of ensuring supervision of worker health and safety on a national scale.

c. In light of the clarity of the Act's language and structure, resort to legislative history is unnecessary. See, *e.g.*, *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 808, 809 n.3 (1989) (citing *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 199 (1977)). Nonetheless, the Act's history supports our view that Section 18 preempts state regulations that have not been approved by the Secretary as part of a state plan—even if they do not directly conflict with the applicable federal standard.

First, Congress rejected proposals that would have preempted only those state regulations that were "in conflict" with a federal standard. S. 2788 and H.R. 13373, 91st Cong., 1st Sess. § 14(b)(1) (1969), *reprinted in Leg. Hist.* 58, 706.[9] Second, the history of Section 18(h)

to "assume the fullest responsibility" for protecting worker health and safety, Congress explicitly stated that the means for doing so were by providing federal grants to aid in identifying areas of need, and by developing and implementing state plans under Section 18. See 29 U.S.C. 651(b)(11). This section thus cannot be read, as petitioner contends (Pet. Br. 20), as a general preservation and affirmation of traditional state regulatory authority.

[9] Congress also rejected proposals that would have permitted any state standard affording "significantly greater protection" than a

—the two-year transitional provision permitting States to enforce certain state worker safety laws in advance of plan approval—provides further confirmation. S. 2193, § 17(h), and H.R. 16785 (as amended by Committee on the Whole), 91st Cong., 2d Sess. § 18(h) (1970), *reprinted in Leg. Hist.* 572, 1105.

Significantly, every version of Section 18(h), including its final form, required a *formal agreement* between the Secretary and the States authorizing concurrent enforcement of state standards, regardless of whether they conflicted with the federal standard.[10] Representative Hathaway, the House sponsor, stated that the "only purpose" of the section was to "allow the States to continue

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federal standard, S. 2788 and H.R. 13373, *supra*, § 14(b)(2), *reprinted in Leg. Hist.* 58, 706, and that would have given the Secretary discretion to decline jurisdiction over any occupational safety and health issue whenever a state law and its enforcement "would reasonably carry out the objectives of this Act." S. 2864, 90th Cong., 2d Sess. § 12(a) (1968), *reprinted in* 114 Cong. Rec. 604 (1968); H.R. 4294, 91st Cong., 1st Sess. § 12(a) (1969), *reprinted in Leg. Hist.* 671. In contrast to the proposals that were rejected, the statute that Congress ultimately passed can only be read as clearly and comprehensively ousting the States from jurisdiction outside the state plan structure.

[10] The Senate version of Section 18(h) would have restricted such agreements to those authorizing interim state enforcements of non-conflicting state standards that were "more stringent" than federal standards. S. 2193, *supra*, § 17(h), *reprinted in Leg. Hist.* 572. Its purpose was to give the Secretary "authority to continue worthy State operations until he is ready to step in with the authority given him by this bill." *Leg. Hist.* 50 (statement of Sen. Javits). The House amendment also required interested States to enter into interim agreements with the Secretary, but did not restrict the States to enforcing only non-conflicting, more stringent standards. H.R. 16785, *supra*, § 18(h), *reprinted in Leg. Hist.* 1105. The reason for the difference was to permit the Secretary to authorize state enforcement of conflicting or less stringent state standards until the federal standard "is ready to be enforced." *Leg. Hist.* 1067-1068 (statement of Rep. Hathaway). The Conference Committee adopted the House version, which became Section 18(h) of the OSH Act. See *Leg. Hist.* 1173, 1195, 1248.

to enforce their own standards with respect to the area covered by the Federal standards" during any delay between the effective date of federal standards and their enforcement. *Leg. Hist.* 1067 (statement of Rep. Hathaway).

Petitioner has no explanation for why an agreement "under which the State will be permitted to continue to enforce" state standards pending approval of a state plan was necessary, if, as she maintains, the Act did not oust the States from enforcing supplemental standards in any circumstance.[11] Moreover, the virtually contemporaneous interpretation of the Secretary underscored the understanding that the section was a temporary exception to the general principle of exclusive federal jurisdiction:

> Section 18(h) permits the Secretary to provide an alternative to the *exclusive Federal jurisdiction [over] occupational safety and health issue[s]*. This alternative is temporary and may be considered a step toward the more permanent alternative to exclusive Federal jurisdiction provided by sections 18(b) and (c) following submission and approval of a plan submitted by a State for the development and enforcement of occupational safety and health standards.

29 C.F.R. 1901.2 (promulgated Apr. 13, 1971, see 36 Fed. Reg. 7006) (emphasis added).

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[11] It is no answer to state that such agreements were necessary to preserve state standards that were less stringent than federal ones, because the plain language of Section 18(h) requires an agreement to permit enforcement of *all* state standards during the statutory interim period—those that are both more and less restrictive than federal standards. Under petitioner's theory however, the States were then, as they are now, perfectly free to "supplement" federal standards as they see fit.

B. A State Dual Purpose Standard Is Preempted if Its Primary Purpose or Effect Is To Regulate an Occupational Safety and Health Issue Addressed by a Federal OSHA Standard

As we have argued, the only reasonable interpretation of Section 18 is that a State may not enforce any "occupational safety and health standard," 29 U.S.C. 667(b), without the approval of the Secretary, if a federal standard relating to the same issue is in effect. The dispositive issue in this case, therefore, is whether "dual purpose" safety and health regulations, which promote the safety and health of workers and the general public, should be characterized as "occupational safety and health standards" within the preemptive scope of the Act. The Illinois laws at issue in this case, which were expressly adopted "to promote job safety and to protect life, limb, and property," represent such dual purpose regulations.

1. The Secretary has long maintained that a state law that has been adopted for the primary purpose or has the primary effect of regulating a worker health and safety issue already governed by a federal standard is preempted, even if the state law has a dual purpose.[12] The statute requires this conclusion because the preemptive scope of Section 18 extends to any "occupational safety and health standards" relating to the issue addressed in a federal standard, 29 U.S.C. 667(b), and such standards are expressly defined to include regulations that "require conditions, * * * practices * * * or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." See § 3(8), 29 U.S.C. 652(8).

[12] By regulation, the Secretary has said that an occupational safety and health standard can be applicable "only to employees, and their employment and places of employment," so that an OSHA standard is inapplicable to the extent it "protects on its face a class of persons larger than employees." 29 C.F.R. 1910.5(d). A longstanding program directive provides that state activities like fire protection on behalf of public safety "predominantly for the purpose of protecting a class of persons larger than employees * * * when enforced for such purpose" are not affected by OSHA preemption. OSHA Instruction STP 2-1.10A (Mar. 13, 1981), which replaced an identically worded OSHA Instruction STP 2-1.10 (Aug. 16, 1972).

This statutory definition simply does not exclude dual purpose laws. A state law requirement that has a primary purpose or effect of providing "safe or healthful employment" remains an "occupational safety and health standard" even if it also has the purpose or effect of protecting non-workers. Moreover, dual purpose laws are certainly "related to" federal standards addressing the same "issue." No more is required in order to trigger Section 18(b)'s plan requirement. This construction of these provisions is reasonable, and is accordingly entitled to deference.[13] *Martin* v. *OSHRC*, 111 S. Ct. at 1176, 1179-1180; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

2. Petitioner's contention that preemption of such dual purpose laws will lead to "disaster for a wide variety of

[13] Section 6(a) of the OSH Act, 29 U.S.C. 655(a), authorized the Secretary, during the first two years of the Act, to adopt as final standards existing national consensus standards and established federal standards. Many of these were not limited to worker protection, but included other provisions directed at issues such as public safety or property protection. While the Secretary's enforcement authority extended only to the worker protection aspects of these rules, the standards nevertheless remained on the books, as written, as federal "occupational safety and health standards" until OSHA later amended them. In revoking certain of the standards, the Secretary explained: "[T]he Agency proposed for revocation under this criterion provisions which were determined to explicitly and primarily affect the general public or property. However, standards which OSHA has ascertained do directly benefit employee safety and health, notwithstanding any public safety or property aspects, have not been revoked." 43 Fed. Reg. 49,726-49,727 (1978) (revocation of selected general industry safety and health standards).

state and local public health and safety legislation" (Pet. Br. 35) ignores the limitations imposed by the language of the definitional section, 29 U.S.C. 652(8), and the Secretary's interpretation. The preemptive scope of Section 18 is limited to those laws that can fairly be categorized as an "occupational" health and safety standard. A law that does not have a clear and substantial impact on worker health or safety, and only incidentally relates to an OSHA standard, should not be characterized as an "occupational" standard "relating" to an OSHA-regulated "occupational" health and safety issue.[14] See *Shaw*, 463 U.S. at 100 n.21; cf. *San Diego Unions* v. *Garmon*, 359 U.S. 243 (1959); *English* v. *General Electric Co.*, 496 U.S. 72 (1990). Only standards that have a clear and substantial impact on worker health and safety relating to an issue covered by a federal standard would meet this definition under the Secretary's interpretation.

In contrast, adoption of petitioner's interpretation would permit a State to evade the Act's preemptive reach simply by claiming a purpose or effect broader than worker health or safety. Petitioner's further suggestion that laws adopted in the form of occupational licensing requirements are not "occupational safety and

[14] A state law of general applicability that only incidentally affects workers, not as a class, but as members of the general public, cannot fairly be described as an "occupational" standard. As an example, an OSHA vehicle occupant safety standard, which is currently under agency consideration, would not preempt a prototypical state seat belt or motorcycle helmet law. See 55 Fed. Reg. 28,728, 28,739 (1990). Similarly, the OSH Act does not typically preempt state fire protection, boiler inspection, or building and electrical code requirements, even though there are OSHA standards on these subjects, because the state standards do not aim to protect workers as a class, and do not have that primary effect. An *occupational* licensing law, however, meets the threshold requirement of being an "occupational" standard, and, as discussed below, the central question then is whether, in primary purpose or effect, it regulates a safety and health issue related to one addressed by a federal standard.

health standards" (Pet. Br. 31-33; see also New York State *et al.* Amicus Br. 13-14; AFL-CIO Amicus Br. 5-9, 17, 24) would represent a similar evasion of the statute that is not consistent with its broad definitional language. A licensing statute that "requires conditions," such as training, testing and the issuance of a license, in order to "provide safe or healthful employment," 29 U.S.C. 652 (8), is a safety and health occupational standard under the statute. It is the "nature of the activities which the States have sought to regulate, rather than * * * the method of regulation adopted" that is determinative. *Garmon*, 359 U.S. at 243; cf. *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 484 (1987).[15]

Under the Secretary's interpretation, the vast majority of state occupational licensing requirements would not be preempted, because their primary purpose or effect is not the regulation of worker safety, but rather public safety.[16] All that the OSH Act requires is that the States either confine their regulations to issues that do not substantially intrude upon the federal occupational safety and

[15] A rule establishing a licensing requirement is a rule, not an adjudication or a license, within the meaning of the Administrative Procedure Act, and may thus properly be classified as a "standard." See *Northwest Airlines, Inc.* v. *Goldschmidt*, 645 F.2d 1309, 1921 (8th Cir. 1981); *Chemical Leaman Tank Lines, Inc.* v. *United States*, 368 F. Supp. 925, 933-936 (D. Del. 1973) (three-judge court).

[16] State licensing of the medical professions is a good example. The Secretary recently promulgated a bloodborne pathogens standard regulating occupational exposure to blood or other potentially infectious materials. 56 Fed. Reg. 64,175 (1991), to be codified at 29 C.F.R. 1910.1030. Its concern is exclusively with safe work practices and related training. In contrast, licensing statutes such as the Illinois Dental Practice Act, Ill. Ann. Stat. ch. 111, paras. 2301-2357 (Smith-Hurd 1991), the Illinois Nursing Act of 1987, Ill. Ann. Stat. ch. 111, paras. 3501-3549 (Smith-Hurd 1991), and the Illinois Medical Practice Act of 1987, Ill. Ann. Stat. ch. 111, paras. 4400-1 to 4400-63 (Smith-Hurd 1991), do not relate primarily to the occupational safety and health issues addressed in the federal standards, but rather to ensuring for the general public that health service providers provide adequate and competent services.

health domain, or comply with the carefully crafted state plan requirements set forth in Section 18.[17]

3. a. This Court should reject the tests of the First, Second, and Third Circuits. Those courts have essentially held that a State may enforce a state safety and health requirement that protects workers—even though the state requirement relates to an issue addressed by an OSHA standard and the State has not submitted a Section 18(b) state plan—if the regulatory requirement at issue also protects non-workers. Those courts have developed three different analytical approaches for distinguishing state laws that protect only workers from those that protect a broader category of persons, but their common failing—in contradiction to fundamental preemption principles, see, *e.g.*, *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 482 (1990)—is that they focus principally on the state objective without regard to the federal objective. See *Associated Indus.* v. *Snow*, 898 F.2d 274, 279 (1st Cir. 1990); *Environmental Encapsulating Corp.* v. *City of New York*, 855 F.2d 48, 57 (2d Cir. 1988); *Manufacturers Ass'n of Tri-County* v. *Knepper*, 801 F.2d 130, 138 (3d Cir. 1986), cert. denied, 484 U.S. 815 (1987); *New Jersey State Chamber of Commerce* v. *Hughey*, 774 F.2d 587 (3d Cir. 1985).

Although those courts disagree as to whether one should look to whether the "primary purpose" of the state law

[17] For example, in the hazardous waste area, the Secretary would not purport to preempt state standards clearly directed at environmental protection outside the workplace, such as the establishment of a program to promote the recycling and treatment of hazardous and solid wastes, or requiring an owner or operator of a facility to report releases of hazardous chemicals. See, *e.g.*, the Illinois Hazardous and Solid Waste Recycling and Treatment Act, Ill. Ann. Stat. ch. 127, paras. 2703-1–2703-8 (Smith-Hurd 1991), and the Illinois Emergency Planning and Community Right to Know Act, Ill. Ann. Stat. ch. 111½, paras. 7701-7719 (Smith-Hurd 1991). To the extent that such requirements have any impact on worker health and safety, it is only incidental, and, more importantly, is the result of the requirements' impact on the general public as a whole.

is to protect workers or the public, *Manufacturers Ass'n of Tri-County*, 801 F.2d at 138, or to whether the law has a "substantial purpose apart from protecting * * * workers," *Environmental Enscapulating Corp.*, 855 F.2d at 57, or to whether the "effect" of the state law is "solely" to protect workers, *Snow*, 898 F.2d at 279-280, they agree that Section 18(b) does not generally preempt occupational safety and health requirements that protect both workers and non-workers. This approach cannot be reconciled with the clear statutory command that state standards relating to the same issue as federal standards are preempted unless they are part of an approved state plan.

b. By contrast, the Seventh Circuit's approach is consistent with the Secretary's position. Most importantly, the court's analysis—like that of the Secretary's—properly focuses on the OSH Act and the effect of the state regulation on occupational safety and health issues addressed in the related OSHA standard.[18] The court first determined that "an OSHA standard exists, and the state has not submitted a section 18 plan." Pet. App. 19. Analyzing Illinois' 4000-hour experience requirement (the only state law provision contested on appeal that the district court squarely addressed), the court found that it constituted a worker protection regulation that was "directly, clearly, and substantially" related to the OSHA standard. *Id.* at 29. Because it was not possible to sep-

[18] "[T]he question whether a certain state action is preempted by federal law is one of *congressional* intent," not state intent. *Ingersoll-Rand*, 111 S. Ct. at 482 (quotation marks and citations omitted; emphasis added). As this Court has said, "state law may [not] frustrate the operation of federal law as long as the state legislature * * * had some purpose in mind other than * * * frustration * * * [S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law." *Perez* v. *Campbell*, 402 U.S. 637, 651-652 (1971).

arate its "worker health and safety goal" from the "public health and safety goal," *ibid.*,[19] the court concluded that Illinois' failure to include that requirement as a part of a state plan, in accordance with Section 18(b), rendered it unenforceable.

The Seventh Circuit's verbal formulation differs somewhat from that of the Secretary. Nonetheless, we view the "direct, clear, and substantial" relationship test to be substantially the same as the Secretary's "primary purpose or effect" test.[20] We differ with the Seventh Circuit to the extent that the court's test altogether bars consideration of a state law's purpose. Although we share that court's skepticism regarding the advisability of attempting to derive subjective legislative intent, a state law that *states* as a primary purpose the protection of worker health ought not necessarily to be saved because it appears to be ineffective, *i.e.*, that it may not achieve its proposed effects. Moreover, we do not believe that a factual inquiry is required before a state law that proclaims a primary purpose to regulate worker safety (and is related to an existing federal standard) is invalidated.

[19] Since OSHA standards apply only in the context of protecting worker safety, the court of appeals was correct to determine whether the 4000 hours requirement was only partially preempted. We agree, moreover, with the court of appeals that the worker protection and non-worker protection aspects of the requirements could not be disentangled, and that the provision had to stand or fall as a whole. That analysis, however, is separate from the state-law question whether the invalid portions of Illinois' legislative scheme are severable. See, *e.g.*, *Watson* v. *Buck*, 313 U.S. 387, 395-396 (1941); *Environmental Enscapulating Corp.* v. *City of New York*, 855 F.2d 48, 59-60 (2d Cir. 1988). That issue, which the court of appeals did not address, is not presented at this stage of the litigation.

[20] The only difference is that the Secretary's formulation requires invalidation of a state law where the primary purpose is to affect worker health and safety, while the Seventh Circuit's test focuses only on the effects of the law. The "purpose" prong of the Secretary's test does not focus on the subjective intent of the state law at issue, however, but rather on the State's stated purpose in enacting a statute.

Thus, although separate consideration of "purpose" and "effects" will in most cases be unnecessary—and the Seventh Circuit's impact approach coterminous with the Secretary's—the stated purpose of a state law can be relevant in limited circumstances. Notwithstanding this minor and limited difference between the Secretary's approach and the Seventh Circuit's, we believe that the Seventh Circuit's holding that Section 18(b) preempts state safety and health laws that have a clear and substantial impact on worker health and safety, even though they also regulate the public health and safety, is correct.

4. We agree with the Seventh Circuit that the 4000 hour experience requirement adopted by the State of Illinois is an occupational health and safety standard relating to the federal OSHA standard in effect for hazardous waste employment. By its terms, it has a substantial and direct impact, or a primary effect, upon the safety "practices" of hazardous waste workers in Illinois. See § 3(8), 29 U.S.C. 652(8) (defining occupational safety and health standard). The OSHA standard, however, requires only "a minimum of 40 hours of instruction off the site, and a minimum of three days actual field experience" for equipment operators. See 29 C.F.R. 1910.120(e)(3)(i); see generally 29 C.F.R. 1910.120(e). Although it supplements the federal requirements, the State's requirement therefore relates to the issue covered by the federal standard. Further, the requirement that a crane operator be accompanied and supervised by another worker for the first 4000 hours of his experience is designed to, and will, affect the competence and skill of such workers so that their work environment will be safer for both them and their fellow workers.[21] Thus, we agree with the

[21] Although Judge Easterbrook may be correct that a 4000 hours training requirement may at some point pass the point of diminishing returns with respect to its impact on worker safety, that does not change the fact that the requirement's effect up to that point will be substantial and direct. The fact that the State may have overregulated does not mean that the regulation does not have a primary effect of protecting worker safety. It would be odd to hold that a State requirement that goes too far in attempting to protect

Seventh Circuit that the 4000 hours requirement cannot supplement the federal training and experience requirements absent submission of a state plan.

CONCLUSION

The decision of the Seventh Circuit should be affirmed.

Respectfully submitted.

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worker safety is saved from preemption, and that a requirement that is better calibrated—going no further than necessary to have the same effect on worker safety—is not.

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